

# THE SOLICITORS' JOURNAL



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## CURRENT TOPICS

### Future of the Trial Lawyer

ANALOGOUS if not identical problems and phenomena to those which have appeared in this country in recent years, connected with the administration of justice and the apparently lessening scope for the advocate, seem to be appearing in the United States. A recent address on "The Future of the Trial Lawyer," by the Hon. DAVID W. PECK, Presiding Justice of the Appellate Division of the Supreme Court of New York, to a division of the American Bar Association, is reprinted in the *Massachusetts Law Quarterly* for June, 1956. It is a truism in practice in this country that there is little scope here and to-day in civil litigation for the type of jury advocate who became famous in *causes célèbres* in the past. That is because we now have relatively little civil jury litigation. The author of the American address assigned as part cause of the decreasing confidence of the public in the system of justice in the U.S.A. the delay and expense of jury cases. More interesting to lawyers in this country is his further diagnosis that "each new venture into regulation has been accompanied by the creation of a commission, not only to administer the law, but to exercise the corollary judicial power." He did not find it surprising that, where time was of the essence in dealing with modern complexities, Congress should turn away from the courts and create more "streamlined" procedure. Commercial men, he said, also turned away from the courts and created other forums to handle their controversies. One of the "stripping down and speeding up" processes which he recommended for the "judicial juggernaut" was one recently embodied in the law of the State of New York that a case would be ready for setting down without pleadings when a single statement is filed joining in it all the claims and defences and relief claimed. The analogy between this country and the U.S.A. in respect of the need for reform is underlined by the nearly parallel situation in the U.S.A., that the courts have been reduced to "little more than a forum for handling negligence cases." Something far more drastic than the recent "streamlining" of interlocutory proceedings seems to be urgently needed.

### Building Society Funds

WITH restrictions on building society lending making themselves felt in the field of conveyancing business, it is not unenlightening to consider the results of a recent investigation by the Building Societies' Association into the amount of deposits from limited companies held by the societies. The figures on which the Association's findings were based were

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obtained from a representative group of societies of all sizes throughout the country whose assets were equivalent to 45 per cent. of the total assets of the building societies throughout the country. It was ascertained that not more than 2.51 per cent. of the combined assets was represented by investments by all types of companies in these societies. The view had been put forward that funds from limited companies were essentially short-term in nature, and therefore unsuitable as a basis of mortgage lending. It had been suggested that the Association should take steps to restrict this type of business by its members. The Association has now found that the present proportion of such business is well within the capacity of the societies to deal with at any time without embarrassment. It also states that a fair proportion of such company moneys represents deposits by insurance companies, pensions and similar funds, which are less likely to be withdrawn than any other form of investments. Furthermore, societies normally require that depositors of sums exceeding £5,000 should give a longer period of notice than is asked of small depositors, varying from six months to two or three years. Giving figures of deposits and advances for the second quarter of this year, the Association states that the net inflow of funds of 209 reporting societies fell appreciably from £23m. in the first quarter to barely £14m. in the second; the figure was also £23m. in the second quarter of 1955. As a result the total sum advanced fell from £100m. in the second quarter of 1955 to £77m. in the corresponding period of this year.

### Ownership of Parts of the Body

THERE are doubts, it seems, whether human beings have full rights of ownership in their organs and limbs. Offers have been made from time to time direct to the Ministry of Health by healthy people who wish to give in their lifetime one of their eyes to save the sight of other people. In a recent letter to Lt.-Col. LIPTON, M.P., who asked for an official ruling, Miss HORNSBY-SMITH, Parliamentary Secretary to the Ministry, wrote: "The law on the matter is not certain, but I am advised that it is at least possible that for a surgeon deliberately to remove a sound eye from a living person, even with that person's consent, might be held to be a criminal offence. In any case, it seems most unlikely that surgeons would be willing to perform the operation." She added that there had recently been improved arrangements for supplying the hospitals which carry out corneal grafting with eyes derived from patients who have died in hospitals. On the criminal aspect of the matter, surgical operation probably cannot be undertaken if it is likely to cause bodily harm upon the person operated upon, even with his consent. Any other rule would open the door to commercial bargains for the sale of parts of one's living body. The law has always set its face against anything savouring of such a disposition, even to the extent of refusing to distribute among a bankrupt's creditors compensation paid to him for bodily injury (*Beckham v. Drake* (1849), 2 H.L.C. 579).

### Legal Aid in California

WE learn from Mr. JOHN L. COOPER, President of the Los Angeles Board of Hotel and Restaurant Employees, that his union is contemplating the establishment of a legal aid scheme which appears to be more extensive than anything in this country and is described as something new in American trade unionism, which is already familiar with the provision

of medical, hospital, dental and pension benefits for union members. The project envisages that members and their families will be covered in respect of both civil and criminal matters, and the litigant will be able to select his own lawyer from those who agree to participate in the scheme. What will cheer the opponents of the 15 per cent. cut is the information that the fees will be closer to the normal than those provided for by the English and Scottish schemes. We are familiar with schemes sponsored by unions in this country, but most of them do not cover the families of members nor criminal proceedings, apart from what the unions may be willing to do *ex gratia*. Often aid is limited to accidents at work and it is provided that a particular firm of solicitors shall be instructed. The scheme will be financed by a contribution of 2 cents per hour from employers, resulting in a trust fund jointly administered by the employers and the union.

### Sales at Off-Licences

THE Finance Act, 1956, s. 3, has made a change in licensing law which will affect a great many people and remove what many citizens must have considered to be an anomaly. Under the Customs and Excise Act, 1952, s. 149, the holder of a retailer's off-licence was not permitted to sell wine or spirits in any quantity less than one reputed pint bottle, i.e., a half-bottle. This provision dated from at least as early as 1910, but the holders of on-licences could sell liquor in as small a quantity as they liked. The holder of an off-licence was thus precluded from selling what are known as "miniatures," viz., small bottles of whisky, brandy, liqueurs, and so on. The reason for the distinction apparently was that the holder of the on-licence, having to pay much higher duty, should be allowed certain privileges not permitted to the holder of an off-licence. The new Act has repealed the relevant provisions of s. 149 and the holder of an off-licence may now sell spirits or wine in any quantities he pleases, so long as he does not sell them in open vessels or exceed the maximum amount permitted by s. 148 for such sales, viz., two gallons or one dozen quart bottles.

### Incomes of the Self-Employed

THE "Survey of National Income and Expenditure" published on 30th August (H.M. Stationery Office, 6s.) contains confirmation that it is still the self-employed who lag behind in the race for better pay and better living conditions. Personal incomes as a whole, the Survey states, rose 79 per cent. in the period between the beginning of 1946 and the end of 1955. During that period wages and salaries went up 100 per cent., and income from self-employment by 50 per cent. During that period, it is right to add, Britain's total output of goods and services increased by one-third in volume. Half of this increase has taken place since 1952. Last year incomes from wages and salaries rose respectively by 9 per cent. and 7 per cent., income from dividends and interest rose by 8½ per cent., and income from self-employment by 4 per cent. A study of the Survey shows that we are living in an expanding and ever more productive economy. Consequently, while making every possible allowance for the need to keep a firm check on the inevitably inflationary tendencies in such an economy, and the unwisdom of making oneself a target for accusations of lack of public spirit by asking for increases when danger threatens, the inference is inescapable from the figures that the professional classes are high up on the danger list.

## THE CLEAN AIR ACT, 1956

THIS statute, which was passed on 5th July, 1956, is the answer of H.M. Government to the "Beaver Report"—the Report of the Committee on Air Pollution set up shortly after the great London "smog" of December, 1952 (Cmd. 9322). The Act is to come into force on such day or days as the Minister may by order appoint, and he may appoint more than one day for different parts of the Act: s. 34 (1). In this article we are proposing to concentrate on those provisions which will be most likely to concern private practitioners, rather than give a detailed commentary on the complicated administration that will be necessary to implement the Act fully.

Her Majesty's Government have announced that the first part of the Act that will be brought into force is that dealing with smoke control areas (based on the "smokeless zones" of a number of private Acts), and the rest of the Act will be brought into force early in 1958.

### Smoke control areas

Under s. 11, the local authority, i.e., the local county borough or county district council, will be able to make an order declaring the whole or any part of their district (and they may combine with another district or districts for this purpose: s. 31 (3)) to be a smoke control area. Such an order, which has to be advertised as provided in Sched. I, is open to objections by "persons affected," and will not become effective unless and until it has been confirmed by the Minister. Once operative, such an order will have the following effects:—

(i) The emission of any "smoke" (an expression which is defined in s. 34 (1) to include "soot, ash, grit and gritty particles emitted in smoke," but must otherwise, it is submitted, be understood in the dictionary meaning of a visible vapour, and so does not include a colourless gas, such as carbon monoxide or free sulphur dioxide) from a chimney of any building within the smoke control area is made an offence, the only special defence provided for being proof that the emission of smoke was "not caused by the use of any fuel other than" fuel declared by Ministerial regulations to be "authorised fuel."

(ii) Under s. 12, action may voluntarily be undertaken by the owner, occupier or "any person interested in" a private dwelling (this term is explained to some extent in s. 34 (4), but in most cases it will have its normal meaning) within the area, or the owner or occupier may be compelled to take action in compliance with notice served by the local authority, to carry out adaptations in or in connection with the dwelling in order to avoid contraventions of s. 11 (i.e., in order to prevent the emission of smoke). Provided such adaptations are carried out to the satisfaction of the local authority, and (in the case of work voluntarily undertaken) with their prior approval, the local authority are required to repay to the person who has incurred the expenditure a sum equal to seven-tenths thereof. If a notice is served, and this is not complied with, the local authority have power to act in default and to recover three-tenths of the expenditure they thereby incur from the person in default (Pt. XII of the Public Health Act, 1936, applies thereto). Section 14 explains the meaning of "adaptations," by reference to works reasonably necessary to make suitable provision for heating (including the heating of water) and cooking, without permitting the emission of smoke. An explanation is also given of the expenditure that may be reckoned for the purposes of s. 12, the cost of

providing and installing a fixed cooking or heating appliance in particular being included (see s. 14 (2)). A special grant may (but need not) be made by the local authority in respect of expenditure incurred under s. 12 on behalf of a church or chapel or charitable, etc., premises. No grants are payable, however, in respect of other premises (except private dwellings as mentioned above), but in practice this is not expected to cause as much hardship to industrial premises as might appear, as the Ministry are understood to favour the constitution of only moderately small smoke control areas, this device being aimed primarily at domestic chimneys by which nearly half the pollution of the air is at present caused (Beaver Report, para. 68.)

The creation of a smoke control area is the feature in the Act which is most likely to concern the private individual. A prospective purchaser will be concerned to ascertain whether or not an order has been made (or modified, revoked, etc.) affecting his property, and whether any notice has been served under s. 12. It is perhaps unfortunate that provision was not made in the Act for smoke control area orders to be registrable in the local land charges register; as it is, reliance will have to be placed on a special inquiry of the local authority.

### Prohibition of dark smoke

"Dark smoke," a vapour less dense than the "black smoke" of byelaws hitherto in force under s. 104 (1) of the Public Health Act, 1936, is defined (in s. 34 (2) of the 1956 Act) by reference to the "Ringelmann Chart," a shade card, of which an example is given in Appendix II to the Beaver Report. The emission of dark smoke from—

- (i) a chimney of a building;
- (ii) a chimney serving the furnace of any boiler or industrial plant (see s. 1 (4));
- (iii) a "chimney" of a railway locomotive engine (see s. 19 (1));
- (iv) a "chimney" of a vessel (s. 20 (1)) in certain territorial inland waters, whether there moored or not,

is totally prohibited, subject to certain defences provided for in s. 1, and a period of grace for seven years given by s. 2, where special considerations apply. Under s. 2 also a procedure is laid down whereby the certificate of the local authority may be obtained to the effect that those special considerations shall be deemed to have been met. These provisions are, of course, aimed primarily at industrial premises, but they apply also to other types of buildings; however, the defences of s. 1 are so complicated that it would seem difficult to secure a conviction for an offence against the section except in the most flagrant case.

### Furnaces and ovens

Section 3 provides that any furnace (not designed solely or mainly for use for domestic purposes, with a maximum capacity of less than 55,000 B.Th.U.s. per hour) installed in a building or in any boiler or industrial plant attached to a building must be, so far as practicable, capable of being operated continuously without emitting smoke (not necessarily dark smoke); any furnace installed in accordance with plans and specifications approved by the local authority for the purpose is deemed to comply with the section. There is no need for plans to be so submitted, but this will be the obvious course to take in practice.

The emission of grit and dust from solid fuel-burning furnaces is controlled by s. 5, and all practicable means must be taken to prevent such emission. Similarly, by s. 6, the plans of furnaces and ovens consuming pulverised or solid fuel (at the rate of one ton an hour or more) must be submitted to and approved by the local authority; the submission of plans is here obligatory, but there is a right of appeal to the Minister in the event of any rejection of plans by the local authority (see s. 6 (4)). Section 9 extends these provisions to any furnace of a boiler or industrial plant whether in or attached to a building, or for the time being fixed to or installed on any land.

Section 10 extends the ordinary system of building byelaw control under the Public Health Act, 1936, so that a local authority may (subject to a right of appeal to the Minister) reject plans for the erection or extension of a building (outside London) on the ground that the height of a chimney shown on the plans is not sufficient to prevent, so far as practicable, the smoke, grit, dust or gases from becoming "prejudicial to health or a nuisance" (an expression which is defined in s. 343 (1) of the Public Health Act, 1936). "So far as practicable" is a delightfully vague expression which is "defined" by s. 34 (1), and will obviously be used as the "means of escape" for an otherwise desperate defendant in proceedings brought under this and a number of other provisions of the Act.

#### Chemical, etc., factories

Certain industrial processes, such as lime and cement works, sulphuric or hydrochloric acid works, smelting works, etc., are, apart from the 1956 Act altogether, subject to the special control of the Alkali, &c., Works Regulation Act, 1906,\* administered by the Alkali Inspectorate of the Ministry of Housing and Local Government. This control is now extended to the emission of smoke, grit and dust from those premises to which it already applies so far as the emission of "noxious or offensive gases" is concerned (see s. 17 (1) of the 1956 Act); and proceedings may be taken for offences against ss. 1, 5 and 16 of the 1956 Act in respect of such premises only with the consent of the Minister of Housing and Local Government.

#### Smoke nuisances

Section 16 virtually replaces s. 101 of the Public Health Act, 1936, in that the emission of smoke (other than smoke emitted from the chimney of a private dwelling or dark smoke emitted from a chimney of a building, etc., contrary to s. 1) which is a nuisance to the inhabitants of the neighbourhood may be dealt with by the local authority as a "statutory nuisance" for the purposes of the Public Health Act, 1936 (see ss. 92-100 thereof). An expeditious modification of the usual procedure is provided for in s. 16 (2), in cases where a nuisance has occurred and ceased, but is considered to be likely to recur.

#### Procedure and miscellaneous provisions

The emission of smoke and fumes from colliery spoilbanks is controlled by s. 18; the provisions of the Act—in a very lukewarm fashion—are applied to Crown premises in s. 22;

\* The operative word in the short title of this Act is the ampersand; there are probably many more acid works than alkali works, and the list of "scheduled processes" has been extended by Orders made under the Public Health (Smoke Abatement) Act, 1926. It is understood that further orders may soon be expected; and the new Act gives power to modify existing orders (see s. 17 (3)).

and s. 23 provides for the setting up of two "Clean Air Councils," one for England and Wales, and one for Scotland.

The occupier of premises where an offence has been or is being committed under s. 1 (Emission of dark smoke) or s. 11 (Emission of smoke in a smoke control area), or where a smoke nuisance exists or has existed, must be notified of the fact within forty-eight hours of the matter coming to the notice of an authorised officer (usually the medical officer of health or a sanitary inspector, or rather, as we must now call him, a "public health inspector": Sanitary Inspectors (Change of Designation) Act, 1956) of the local authority (see s. 30).

A number of elaborate definitions of words and expressions used in the Act are given in s. 34; these are so detailed that it is really not safe to read the Act without continually bearing them in mind. In addition, the special meanings given to such words as "owner" and "local authority" by s. 343 (1) of the Public Health Act, 1936, will apply to this Act by virtue of the incorporation of Pts. I and XII of that Act by s. 31 (1) of this Act. The incorporation of Pt. XII also applies to this Act the provisions therein about the signature and service of notices (ss. 284 and 285), the powers of entry of an authorised officer (s. 287, as modified by para. 1 of Pt. I of Sched. III to the present Act), the recovery of expenses (ss. 290-295), and the prosecution of offences (ss. 296-299; s. 297 is modified by para. 2 of Pt. I of Sched. III, and penalties for offences are prescribed by s. 27 of the 1956 Act; Sched. II brings the penalties that may be awarded in respect of offences under the "Alkali Act" into line with those that may be awarded for offences under this Act).

Unjustified disclosures of information are prohibited by s. 26; the local authority are given the duty of enforcing the Act by s. 29, and special provisions for London appear in s. 32 and Pt. II of Sched. III, and for Scotland in many subsections of various sections throughout the Act, and in Pt. III of Sched. III.

Of more interest to private practitioners will be s. 28, which empowers the local county court to make such order "as may appear to the court to be just" in any case where the occupier of a building is unable to carry out works reasonably necessary to enable a building to be used without contravention of the provisions of the Act without the consent of the owner or some other person interested in the building, or where he considers the cost of carrying out such works should be borne by the owner or some other person so interested. "Person interested" is an expression which appears in several sections in the Act, and is neither defined nor explained. Presumably it is intended to cover lessees and mortgagees as well as fee simple owners, but it is not clear whether weekly tenants would be included, or persons having an equitable interest only. We would respectfully suggest that in future administrative Bills of this kind should at some stage be "vetted" by a practical conveyancer.

#### Conclusion

The foregoing notes have been written as if on the footing that the whole of the Act was now in force; as mentioned, however, at the outset, it seems probable that its provisions will be brought into operation piecemeal. Many of the provisions of the Act will not, moreover, be effective until they have been strengthened by the making of Ministerial regulations. Thus, the installation of density meters, etc., may be required by regulations to be made under s. 4.

the Ringelmann Chart test for dark smoke may be varied by regulations made under s. 34 (2), and s. 7 will not be of any value until regulations have been made providing for the measurement of grit and dust emitted from factories. "Authorised fuel" has to be defined by regulations (see s. 34 (1)), and local Act provisions rendered unnecessary as

a consequence of the coming into force of the Act may be amended by Ministerial orders made under s. 35 (4).

The Act is said to have been passed "to make provision for abating the pollution of the air"; whether or not it achieves that object will depend on the enthusiasm and energy with which local authorities enforce its provisions.

J. F. GARNER.

## PLANNING ENFORCEMENT NOTICES : SOME RECENT DECISIONS—II

### *Brookes v. Flintshire County Council* Was variation the correct procedure ?

IN *Brookes v. Flintshire County Council* [1956] 6 P. & C.R. 140, mentioned in the first part of this article, where part of the development to which the enforcement notice related did not require planning permission under the Town and Country Planning Act, 1947, the Divisional Court dealt with the matter by varying the notice under the provisions of s. 23 (4) (b) of the Act. The writer would suggest with respect that the way to treat a case of this nature would be to quash, under s. 23 (4) (a), the notice in part so far as it related to development for which permission was either not required or had been obtained, and to dismiss under s. 23 (4) (c) the s. 23 appeal as regards the remaining development.

The wording of s. 23 (4) (b) seems intended to cover a case where the local planning authority have correctly alleged that the whole development has taken place without permission, but have asked for excessive steps to be taken for restoring the land; it is not very apt to cover a case such as that of *Brookes*. The wording provides that, if the justices are not satisfied that permission was granted under the 1947 Act for the development to which the notice relates or was not required or that the conditions subject to which permission was granted have been complied with, but are satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, they shall vary the notice accordingly.

Suppose, to take an extreme case by way of example, a local planning authority have served an enforcement notice to demolish four houses built after 1948, two of which were in fact built with planning permission. Surely the justices could be satisfied that part of the development to which the notice relates was carried out with permission and quash the notice as to the two houses. If the notice required the site of the remaining two houses, after demolition, to be sown with grass, when it was in fact previously a bare piece of waste ground, the notice could be varied by omitting this requirement in perfect consonance with the wording of s. 23 (4) (b). On the basis of the decision in *Brookes'* case it would seem that the justices, not being satisfied that the whole development had taken place with permission, could not quash the notice, but could only vary it to what was necessary for restoring the land to its condition before the development took place; but, as the development to which the notice relates is in fact the four houses, as in *Brookes'* case the development to which the notice related was the use of the whole of the field, the power of variation seems to be inapplicable.

However this may be, the decision in *Brookes'* case will no doubt be of considerable benefit to local planning authorities, who are often faced with similar problems.

### Validity of notice served while planning appeal pending : *Davis v. Miller*

The next recent case to be discussed, *Davis v. Miller* [1956] 1 W.L.R. 1013; *ante*, p. 588, raised, on a somewhat complicated set of facts, the simple issue of whether an enforcement notice, served while a planning appeal is pending before the Minister of Housing and Local Government against the refusal of the local planning authority to grant permission for the offending development, is valid. The Divisional Court have said that the notice is valid.

The material facts were briefly that in August, 1952, the Gloucestershire County Council granted to the respondent Miller permission to retain a coach shelter and to continue the use of land as a site for garaging and washing down vehicles for one year subject to a condition that the use should be discontinued and the shelter removed by 27th September, 1953. In October, 1952, Miller appealed to the Minister against this condition, but asked that arrangements for a local inquiry into the appeal should be postponed while he negotiated with the county council about the matter. The negotiations came to nothing, and in November, 1953, the council served the enforcement notice, the subject of the proceedings, requiring Miller to comply with the conditions. He did not do so, but resuscitated his appeal to the Minister. In April, 1954, the Minister dismissed the appeal. In January, 1956, Miller still not having complied with the condition as required by the notice, the appellant Davis, as planning officer of the county council, launched a prosecution under s. 24 (3) of the 1947 Act. The justices were of the opinion that the notice was invalid and dismissed the information, and the appellant appealed by way of case stated to the Divisional Court. The court allowed the appeal as they could find nothing in the 1947 Act to limit the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal.

### How to advise a client

The facts of the case were somewhat exceptional, and the county council in fact acted with complete propriety, as they took no steps to prosecute until well after the Minister had in fact given his decision. If the reader should be faced with a somewhat similar case, but where the prosecution is launched before the Minister's decision is given, then the way to safeguard his client, as suggested by Lord Goddard, C.J., is simply to ask the justices to adjourn the case to await the Minister's decision. Alternatively, if the notice has not yet taken effect when the reader is consulted, the client can be advised, as indicated in the judgment of Ormerod, J., to make a second application for planning permission so as to postpone under proviso (a) to s. 23 (3) the date on which the notice becomes effective until the second application has been determined adversely to him by the authority or by the Minister on appeal.

Similar advice is applicable if the notice is served after an application has been submitted in respect of the offending development and the notice is served before it has been determined by the authority or after such determination and before an appeal has been lodged with the Minister.

### "Discontinuance"

The remaining recent case to be considered was also one in which the East Riding County Council, the appellants in the *Bridlington* case, were concerned, namely, *Postill v. East Riding County Council* [1956] 3 W.L.R. 334; *ante*, p. 490. Fortunately, this case is not concerned with the niceties of form and procedure, but simply with the interpretation of the word "discontinuance." This is a word of considerable importance in the planning world, as the 1947 Act uses it in a number of places. Thus, s. 14 (2) (b) provides that on the grant of a planning permission a condition may be imposed for requiring "the discontinuance of any use of land" at the expiration of a limited period, s. 23 provides that an enforcement notice may require "the discontinuance of any use of land" which is unauthorised, and s. 26 enables the authority, subject to payment of compensation, to make an order (to be confirmed by the Minister of Housing and Local Government) requiring the discontinuance of any authorised use of land.

### *Postill v. East Riding County Council* Facts and decision

The appellant, Postill, obtained a planning permission in May, 1952, permitting him to use land as a temporary site, from 20th July until 7th September in that year, for a travelling circus subject to a condition, of the type envisaged by s. 14, that the use thereby authorised should be discontinued at the end of the period. In fact, the circus left the site in the second week of September in that year, but returned for approximately two months in each of the years 1953 and 1954, and for over two months in the year 1955, without any further planning permission having been granted. While the circus was on the site on the 7th September, 1955, the county council served an enforcement notice on the appellant alleging that the condition in the 1952 permission had been broken by the return visits in subsequent years. The appellant appealed to the justices under s. 23, but the justices dismissed the appeal. The Divisional Court held that the condition had been complied with, as the return visits could not be regarded as a continuance of the use, which ceased as required by the condition when the circus left the site in September, 1952. Lord Goddard, C.J., said that, as the justices had found that the circus did cease on 7th September, 1952, there was no breach of condition, and they ought to have quashed the order. Streatfeild, J., said: "I think that a distinction must be drawn between continuance of user and a repeated user for the same purpose after a substantial interval of time, and I am unable to take the view that a resumption or repetition of the same user starting some ten months later in 1953 was, in fact, a continuance of the same user as in 1952, and so on in 1954 and 1955." Donovan, J., said: "I agree, and I add only this, that the word 'discontinued' does not mean permanently discontinued. One discontinues many things that may be only discontinued for a time, and when one resumes what one has discontinued it does not mean that there has never been any discontinuance. There has been a discontinuance followed by a revival or resumption."

### Its importance

Possibly mere physical cesser of use by itself does not amount to discontinuance. For example, suppose the circus after leaving in the second week of September, 1952, had returned to the site a fortnight later and had remained there since, it seems very doubtful whether the court, or at any rate Streatfeild, J., would have held that there had been a discontinuance. The point is, perhaps, in this context, to some extent academic for, even if the renewed user is not a breach of condition, it will be an unauthorised use in respect of which the authority can serve an enforcement notice for development without permission. It may, however, have an important bearing on conveyancing practice in relation to investigation of "planning title."

### Its bearing on conveyancing practice

The decision emphasises a view the writer has previously expressed, in an article at 96 SOL. J. 143, that a purchaser should not rely upon the statutory four-year time limit on the service of an enforcement notice to cure defects in the planning title of a property, but should make sure that any necessary planning permission under the 1947 Act has been obtained.

The illustration given in that article was of a dwelling-house which started being used as offices without planning permission in August, 1948. In April, 1950, the owner vacated the premises and sold them. The new owner went into the premises in June, 1950, and used them again as offices. The authority's right to serve an enforcement notice for "discontinuance" of the unauthorised use would, the writer said, have come to an end on the vacation of the premises in April, 1950, and a new four-year period would have started to run in June, 1950. If the premises came into the market in September, 1952, it would have been insufficient for a prospective purchaser to satisfy himself that the premises were being used as offices in August, 1948, and in August, 1950, unless he also satisfied himself that there had been no break in the use. Similarly, it would appear, as mentioned in the former article, that if the break occurred between April and June, 1953, i.e., after the expiration of four years from the date the unauthorised use started, instead of 1950, the authority would probably acquire a fresh right to serve an enforcement notice which would start a new four-year period running. There is no provision in the 1947 Act that after the expiration of four years an unauthorised use is deemed to be permitted.

The article also went on to say that it might be argued that mere physical discontinuance, as distinct from intentional abandonment by the owner, of the offending use was insufficient to constitute a break; but that the right of an authority to serve a notice must surely depend upon what they found on the premises and not what was in the owner's mind. The question of the sufficiency of mere physical cesser of user to constitute a "discontinuance" in the case of a short break is, as mentioned above, still in some doubt, but the difficulties which beset an authority seeking to enforce planning control are already sufficiently great without requiring them to read an owner's mind.

To summarise, it is important, in the writer's view, for a prospective purchaser's solicitor to ensure that where the use for which property is being bought by his client started since 1st July, 1948, there is in force a planning permission covering it. If he does not, his client runs the risk of losing the use without compensation through the medium of enforcement proceedings if there has been a break in the use within the

last four years, or if there is a break in the future after he has bought.

It was mentioned above that the word "discontinuance" was also important in relation to orders made by a local

planning authority under s. 26 of the 1947 Act. In this case, however, the section expressly makes it an offence to restart without planning permission a use discontinued under an order, so that no doubts can arise.

R. N. D. H.

## A Conveyancer's Diary

# LAND CHARGES: REPORT OF ROXBURGH COMMITTEE—III

THE last of the three matters referred to this Committee was to advise whether any, and if so what, amendments should be made in the law affecting the liability of lessees and assignees of leases in respect of land charges registered against their landlords. The central point of this problem is in s. 44 (5) of the Law of Property Act, 1925, and the background to it is described in the Committee's report in this way.

### Right to call for title to freehold

Before the passing of the Vendor and Purchaser Act, 1874, an intending lessee was entitled to call on the intending lessor to prove his title to the freehold, and an intending assignee was entitled to call on the intending assignor to prove the lessor's title to the freehold for a period prior to the lease which when added to the period which had elapsed since its grant amounted to sixty years. If this right was waived, the intending lessee or assignee was held to have constructive notice of everything which he would have discovered if he had investigated the title. But in practice the right to call for the title to the freehold was usually excluded by contract, and s. 2 of the 1874 Act provided that, subject to any stipulation to the contrary, an intending lessee or assignee should not be entitled to call for the title to the freehold. This provision was later supplemented by the Conveyancing Act, 1881, which provided that, subject to any stipulation to the contrary, under a contract to grant or assign a term of years derived out of a leasehold interest, the intended lessee or assignee should not have a right to call for the title to the leasehold reversion. (These provisions now appear in the statute book as subs. (2), (3) and (4) of s. 44 of the Law of Property Act, 1925.)

### Notice of incumbrances where freehold title not investigated

In *Patman v. Harland* (1881), 17 Ch. D. 353, it was held that a lessee who had not stipulated to the contrary, although precluded by s. 2 of the 1874 Act from investigating his landlord's title, nevertheless had constructive notice thereof. The rule in *Patman v. Harland*, as it came to be called, was reversed by subs. (5) of s. 44 of the Law of Property Act, 1925, which provides that "where by reason of any of the three last preceding subsections an intending lessee or assignee is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not . . . be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice."

There is nothing, the Committee observes, in this subsection to indicate how it is to operate in relation to incumbrances created after 1925 and protected by registration. If an owner of unregistered land who entered into a restrictive covenant before 1926 grants a lease of the land to-day under a contract

by which the intending lessee does not stipulate for a right to be furnished with the title to the freehold, the lessee takes free from the restrictive covenant by virtue of s. 44 (5). But if the covenant was given after 1925 and registered, then by virtue of s. 198 of the Law of Property Act the registration is "deemed to constitute actual notice" of the covenant to the lessee. Again, if the land is registered land, s. 50 (2) of the Land Registration Act, 1925, provides that, where notice of a restrictive covenant has been entered on the register, "the proprietor of the land and the persons deriving title under him shall be deemed to be affected with notice of the covenant as being an incumbrance on the land." These provisions, it is pointed out, are obviously difficult to reconcile with s. 44 (5).

Mention is then made of the case of *White v. Bijou Mansions, Ltd.* [1937] Ch. 610, in which these problems were considered, and the result of that case is summarised as follows. Simonds, J. (as he then was), first expressed the view (by way of *dictum*) that in the case of unregistered land, s. 198 was the governing section and that, notwithstanding s. 44 (5), a lessee must be deemed to have notice of any instrument or matter registered under the provisions of the Land Charges Act at the date of the lease. It was then decided that s. 44 (5) had no application to registered land at all and that under the Land Registration Act a lessee of registered land is affected by notice of incumbrances appearing on the charges register of the freehold title, notwithstanding that under the contract to grant the lease he had no right to inspect the register. The comment of the Committee on this state of affairs is that the attempt to reverse the rule in *Patman v. Harland* by enacting s. 44 (5) of the Law of Property Act has been partially nullified by the simultaneous enactment of s. 198 and by the corresponding provisions with regard to registered land.

That being the history of the matter, the Committee then proceeded to consider the question submitted to it. This it did first in relation to unregistered land, and then in relation to registered land.

### Recommendations as to unregistered land

As regards unregistered land, the position is described as anomalous. A lessee, in the normal case where he has not stipulated to see the title to the freehold, is not deemed to have notice of incumbrances which cannot be registered, e.g., a restrictive covenant created before 1925 or contained in a superior lease. On the other hand, whether or not he stipulates for a right to see the freehold title, he is deemed to have notice of registered incumbrances. In the Committee's opinion there is no reason for this distinction. The suggested cure for this anomaly is the restoration of the rule in *Patman v. Harland*. If land is subject to an equitable incumbrance which will be enforceable against a purchaser whatever title he agrees to accept, it is not clear why the incumbrance

should not be enforceable against a lessee of the land simply because (in accordance with the usual practice) he has refrained from stipulating for the right to be furnished with the title to the freehold. Whether a landowner sells his land or leases it, and, if he leases it, whether or not the lessee has under his contract a right to examine the lessor's title, are matters which, in the Committee's view, ought not to affect the rights of an incumbrancer one way or the other.

#### Registered land

In the case of registered land the problem is described as somewhat different, the matter being governed entirely by the Land Registration Act. Under that Act a lessee or an assignee of a lease takes free from incumbrances affecting the freehold or the superior leasehold title unless they are entered on the charges register of such title or are overriding interests. So far as local land charges are concerned the position of a prospective lessee or assignee of a lease is much the same in the case of registered land as it is in the case of unregistered

land. In the case of other land charges, on the other hand, the position of a prospective lessee or assignee of a lease of registered land is described by the Committee as somewhat worse than that of his counterpart in the case of unregistered land. In the latter case, the prospective lessee or assignee can, as the law now stands, even if he does not contract to be furnished with the freehold title, search the land charges register against such names of owners of the freehold as he knows; in the case of registered land, however, if he does not contract to be furnished with his lessor's title, he has no right to inspect the charges register. The Committee is in agreement with the view expressed by Simonds, J., in *White v. Bijou Mansions, Ltd.*, that this is, theoretically at least, a blemish on the land registration system, and recommends that the Land Registration Act should be amended to give a prospective lessee or assignee of a lease of registered land a right to inspect the charges register of the freehold and any superior leasehold title.

"A B C"

### Landlord and Tenant Notebook

## OCCUPIERS' LIABILITY TO CHILDREN

As the brief outline of the Occupiers' Liability Bill given in our issue of 30th June last (*ante*, p. 486) showed, part of the measure is designed to abrogate the decision in *Cavalier v. Pope* [1906] A.C. 428, in which it was held that a landlord bound by a covenant to repair was not liable for injuries occasioned to a stranger to the contract as a result of disrepair. The stranger to the contract in that case was the wife of the tenant; when the case reached the House of Lords, most of the speeches upholding the judgment of the Court of Appeal (reversing that of Phillimore, J., before whom, and a jury, the plaintiff had recovered £75) were terse and pithy; Lord Atkinson alone examined the authorities at some length. Lord James of Hertford said, in a couple of paragraphs, that the wife could not sue on the husband's contract, and that the defendant was not in actual possession of the house and did not occupy it: the plaintiffs (the husband had been one, and the award to him of £25 for expenses was not impugned) were the occupiers; he regretted the result, but moral responsibility, however clearly established, was not identical with legal liability.

Half a century having elapsed, something has been done about the contrast, and landlords and superior landlords are to be subject, once they are liable to their tenants for maintenance or repair of demised premises, to liability towards persons from time to time lawfully on those premises. And that liability is to be measured by reference to a norm called "the common duty of care."

In this article I propose to discuss one feature of the standard of care which Parliament has taken some pains to define: that contained in the provision reminding Her Majesty's judges, as the contributor of the above-mentioned outline put it, "that an occupier must be prepared for children to be less careful than adults." And children are, it is generally recognised, particularly apt both to cause and to suffer damage in their dwellings.

#### The occupier's knowledge

The landlord is to be treated as occupier; and, when a tenant's child is injured and the question arises whether

disrepair in breach of agreement caused the injury, we are likely to be referred to another of Lord Atkinson's speeches, that delivered in *Cooke v. Midland Great Western Railway of Ireland* [1909] A.C. 229. The following passage may bear on many cases: "The principle that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant and could not by reasonable care and observation have detected must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed . . . The duty . . . must, it appears to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

In that well-known decision, a four-year-old boy was awarded damages for injuries sustained when playing with a railway turntable, in pursuance of a habit known to the defendants but which they had taken no steps to prevent.

Two years later, the above authority was distinguished in *Latham v. R. Johnson & Nephew, Ltd.* [1913] 1 K.B. 398 (C.A.), in which the plaintiff was a two-year-old whose hand had been crushed by one of a heap of paving stones deposited on waste land by the defendants, who owned or occupied it. Children had been wont to play there and the defendants had known this; but it was held that there was no allurement, no invitation and no dangerous object.

These particular distinctions may be swept away by the new legislation, but the factor of knowledge, actual or imputed, of propensities is likely to remain active.

#### Duty of protection

Rather surprisingly, very little was heard of the special position of children in the case of *Dobson and Another v. Horsley* [1915] 1 K.B. 634 (C.A.); and what was heard tends to set a limit to the landlord's obligations. The infant plaintiff, aged three and a half, was the son of a tenant-occupier of one room in a house, steps (not, of course, part of the demised premises) leading to the front door. The steps

had the usual railings at the side and one of the upright bars in one railing was missing. The infant plaintiff was playing with his toys on the steps when he fell through the gap into the area below and was injured.

It was, indeed, urged that "looking at the age of the child," the missing railing must have been "in the nature of a trap," but the *ratio decidendi* appears to have been simply that the defective railing was obvious to persons using the steps; it would have been different if the rails had been shaken and given way by laying a hand on them, or by falling against them. Both Buckley, L.J., and Pickford, L.J., considered that the age of the injured person made no difference. The former said: "If this was a dangerous place, as it obviously was, the child ought not to have been there without proper protection, and the liability of the defendant cannot be enlarged by exposing him to a liability for not providing such a railing as would prevent a child from falling into the area." Phillimore, L.J., made no reference to the point.

#### Moral traps

In *Latham v. Johnson*, *supra*, Hamilton, L.J., said that in the case of an infant there were moral as well as physical

traps. It may not, at first sight, be easy to reconcile the judgments in *Dobson v. Horsley*, which I have just cited, with the recognition of a larger duty in *Cooke v. Midland Great Western Railway of Ireland*; but Hamilton, L.J.'s judgment in *Latham v. Johnson* points the way. There must be a temptation which a child would not be expected to easily resist (the learned lord justice deprecated the use of the expression "allurement") and the temptation afforded by some object of attraction might impose liability if the occupier ought to have anticipated the presence of the child and the attractiveness and peril of the object. Thus, it could not be said that the steps on which the younger Dobson was playing would constitute a temptation.

The brief outline in our issue of 30th June suggests that the criterion urged in the plaintiff's argument may have been adopted, and that the element of temptation is not to play a part in cases governed by the Occupiers' Liability Act. "An occupier must be prepared for children to be less careful than adults" is not the same thing as "an occupier must not tempt children to meddle where he ought to abstain," as Hamilton, L.J., put it.

R. B.

## HERE AND THERE

### IMPERSONATION

THE idea of the lost leader who will surely return one day has many forms. It is part of the Arthurian legend. It recurs in mediæval history in the case of Richard II, for instance, after he vanished into Pontefract Castle, or of Richard, Duke of York, the younger of the Princes in the Tower. Nearer our own time there were the rumours of the survival of the pathetic uncrowned Louis XVII, lost in a French revolutionary prison, and of Marshal Ney, believed by some to have given the royalist firing squad the slip. Now it is the turn of Hitler, who sufficiently long after his cataclysmic Wagnerian disappearance in smoke and flame is just about due for resuscitation. And what fitter place for the operation than the land of wide open opportunities, the United States of America? Lately persons thought to be of Nazi sympathies have been receiving letters signed "Adolf Hitler," explaining that he had not perished in the Berlin holocaust but was alive and well and lying low in Kentucky until he could raise sufficient funds to lift his cause from the ashes. Thousands of dollars, apparently, were contributed to this stimulating cause. Then someone, over curious, made an investigation—and who did the writer turn out to be? An ingenious coloured gentleman who, one regrets to learn, was arrested. One will look forward to his trial but rather as an episode in a serial. There will be other Hitlers in the field, though probably not another coloured one, for whom the difficulties of an otherwise simple physical impersonation would appear to be insuperable. Strangely enough, Hitler was impersonated in his lifetime and in Germany, too. In 1934 a small-time criminal called Gustav Kroger began to attract the attention of the German police by going about with a moustache, a haircut and a general demeanour so closely resembling the Führer's that people in the street often thought it was Hitler himself taking an informal stroll. Even after an inspector had warned him of the danger of cultivating the resemblance he was found one day collecting on a flag day for the Winter Help Relief. As a collector he had been an instantaneous, an unparalleled success, for patriotic Berliners, imagining

that Hitler himself was amongst them, pressed on him the most lavish contributions. This time the Gestapo became interested, and poor Kroger was instructed to attend his local police station every month for a haircut and a shave. If he has managed to survive until now his uncanny resemblance to the lost leader may yet be put to most interesting uses. Indeed, if it had occurred to Hitler to use his double as an *alter ego* in awkward situations he might really have survived, even if he never reached Kentucky.

### THE WRECKERS

WITH the technique of the collective smear so highly developed by the exigencies of modern foreign policy, one is sometimes tempted to speculate rather apprehensively on the uses to which an ill-disposed foreign Press might (and perhaps does) put various items of police court news which we ourselves pass over with half an eye and no appreciation of its dramatic possibilities. There was the case of the three boys of sixteen, ten and nine who recently appeared at Nottingham Juvenile Court charged with throwing missiles at a railway engine. From a bridge one of them had scored a direct hit with a large stone on a freight train driver, who had collapsed unconscious with a wound in his head. The eldest boy was sent to an approved school and the other two were fined. Children love drama and incident, and the lads must have enjoyed a crowded hour of glorious life with the train halted and police cars and ambulances concentrating on the spot. A detective told the court that the railway authorities are seriously concerned because children are making a pastime of throwing stones at trains. This fascinating recreation is, of course, not new. You remember that long ago Belloc's

"John Vavasour de Quentin Jones  
Was very fond of throwing stones  
At horses, people, passing trains  
But 'specially at window panes."

But that would make no difference to any foreign journalist who happened to want to draw a picture of the tattered offspring of the downtrodden English working classes inaugurating an

underground class war with an orgy of train wrecking. As a matter of fact the dear little children, not finding the roads of Britain adventurous enough, have discovered that the railways make an exciting playground for playing "last across." A driver of a seventy mile an hour express recently said that they are making his job a nightmare. Lately near Nottingham he saw a hut, a brazier, an old sleeper and some stones laid across the track and only just in time jammed on the emergency brakes. In former times, one supposes, the sort of child whose enterprise took that turn would have been packed off by the magistrates to slake his thirst for adventure at sea. At sea, at any rate, he would learn a personal concern for the operation of the laws of cause and effect. If he tried any wrecking tricks he would be in the same boat with everyone else, not a mere delighted spectator.

## MY MISTAKE

A NEWSPAPER correspondent recently heard a woman passenger on a Number 9 bus outside the Law Courts ask: "Is this Liverpool Street Station?" Her idea of railway stations was clearly based on St. Pancras, which has far more in common with the Law Courts than Liverpool Street. What the Law Courts do share with Liverpool Street (which, by the way, most fittingly stands on the site of the original Bedlam) is its labyrinthine complexities. Gray's Inn, of course, is constantly being mistaken, by National Health beneficiaries working their way up the Gray's Inn Road, for the Royal Free Hospital. One would like to meet the simple sightseer gazing reverently at the Old Bailey dome in mistake for St. Paul's Cathedral or seeking out the Record Office for a record of something out of "Salad Days."

RICHARD ROE.

## NOTES OF CASES

*These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.*

### House of Lords

#### RATING: OIL-DISCHARGING JETTY AND STORAGE TANKS: WHETHER FREIGHT-TRANSPORT HEREDITAMENT

**Shell-Mex and B.P., Ltd. v. Clayton (Valuation Officer)**

Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm

25th July, 1956

Appeal from the Court of Appeal ([1955] 1 W.L.R. 982; 99 Sol. J. 562).

The Rating and Valuation (Apportionment) Act, 1928, provides by s. 5 (1): "In this Act the expression 'freight-transport hereditament' means all or any of the following hereditaments . . . (c) A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers. . . ." By s. 6 (3): "For the purpose of determining in what proportions a freight-transport hereditament is occupied and used for transport purposes and for other purposes, respectively, the hereditament shall be deemed to be occupied and used for transport purposes, except in so far as it is occupied and used for the purposes of a dwelling-house, hotel, or place of public refreshment: Provided that . . . (b) in the case of a hereditament occupied and used for . . . dock purposes as part of a dock undertaking no part of the hereditament, being a building, yard or other place primarily occupied and used for warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport purposes." The British Transport Commission had leased the hereditament in question, being waste land adjoining the Hull dock undertaking, to the appellant company which was concerned in the import and distribution of oil. Pursuant to the terms of its leases, the company had erected on the land storage tanks for oil and the Commission had constructed two jetties which were owned by them. Incoming tankers unshipped their oil at the jetties, the unshipping being effected through a system of pipes running along the jetties to the storage tanks, whence the company distributed it to customers, retaining only a small proportion itself. The company also owned a barge berth some 1,000 feet from the hereditament and connected with it by pipes. The barge berth was a dock within s. 5 (3) of the Act of 1928 and was connected with the hereditament by pipelines owned, used and occupied exclusively by the company. Approximately one-quarter of the oil imported was dutiable and technically the whole hereditament was a bonded warehouse. Substantially all the oil unshipped at the jetties was consigned, pursuant to an agreement, by three oil companies to the appellant company as their sole agent for the

sale and distribution of their oil, the company being remunerated for its services by commission. The company claimed that the hereditament was a "freight-transport hereditament" within s. 5 (1) (c) of the Act of 1928, and as such entitled to be de-rated. The Lands Tribunal and the Court of Appeal having rejected this claim, the company appealed to the House of Lords. The respondents were the valuation officer and the local council.

VISCOUNT SIMONDS said that the company must satisfy three conditions. The first question was: Is the hereditament "used wholly or partly for dock purposes"? The Court of Appeal had answered the question in the affirmative and counsel for the respondents had accepted their decision, but had properly reserved the right to claim an apportionment if the other conditions should be held to be satisfied. The second question was: Is the hereditament used and occupied "for dock purposes as part of a dock undertaking"? The company said first that it was so used as part of the dock undertaking of the British Transport Commission at the port of Hull, but, if that failed, they said that it was part of the dock undertaking carried on by them at the barge berth. It was more advantageous to them to succeed on the first alternative claim, for thus they avoided difficulty on the third condition, since it could not be contended that their merchandise, the oil, belonged to or was intended for the use of the undertakers, the British Transport Commission. The question whether the hereditament was used or occupied for dock purposes by the company as part of the dock undertaking carried on by the British Transport Commission was answered in the negative by the Court of Appeal. Counsel for the company said that the development of the dock undertaking was effected by agreements whereby dock facilities were created for the benefit of individual tenants and that it was immaterial that in regard to any particular site these facilities were private and exclusive. The answer of the respondents, accepted by the Court of Appeal, was that as soon as the hereditament was leased to, and exclusively occupied by, the company for the purposes of their own business, it was segregated and no longer formed part of the Commission's dock undertaking. The decision of the Court of Appeal should be affirmed. His lordship did not doubt that a dock authority might let a hereditament which formed part of its undertaking without its losing its character as a freight-transport hereditament, but it must have that character before it could lose it. As to the company's alternative contention, they operated an undertaking and owned a dock which was connected with the hereditament by pipelines. It was a misuse of language to say that in respect of the barge berth they were carrying on a dock undertaking of which the hereditament formed a part. Further, the company did not establish that a substantial proportion of the volume of business carried on by them at the barge berth was concerned with the shipping and unshipping of merchandise not belonging to them or intended for their use. The oil unloaded at the ship's rail was from that moment in their possession. They were under a contractual obligation to account for the proceeds of

sale, but neither this fact nor the fact that the oil was not in the full legal sense vested in them made it inapposite to describe the oil as "belonging to" them. If the oil did not belong to them, it was at least intended for their use. "Use" was not confined to consumption but included the use of a trader made of his stock-in-trade by selling it. In this sense, the oil was intended for the use of the company. The appeal must be dismissed.

LORD OAKSEY dissented.

The other noble and learned lords agreed that the appeal should be dismissed.

APPEARANCES: *Rowe, Q.C.*, and *J. R. Willis, Q.C.* (*Sydney Morse & Co.*); *Lyell, Q.C.*, and *Patrick Browne* (*Solicitor of Inland Revenue*); *H. E. Davies, Q.C.*, and *E. P. Wallis-Jones* (*Smith & Hudson for Mainprize, Rignall & Whitworth, Hull*).

[Reported by F. COWPER, Esq., Barrister-at-Law] [1 W.L.R. 1198]

## Court of Appeal

### BANKRUPTCY: SET-OFF: WHETHER DEBT DUE AT DATE OF RECEIVING ORDER

*In re a Debtor (No. 66 of 1955); ex parte The Debtor v. Trustee of the Property of Waite (a bankrupt)*

Lord Evershed, M.R., Jenkins and Hodson, L.JJ. 13th July, 1956  
Appeal from the Divisional Court (Harman and Danckwerts, JJ.).

In January, 1952, the debtor agreed to sell to one Waite on credit goods for which the debtor had to pay in cash. In order to pay for the goods the debtor found it necessary to borrow money from his bank, and Waite, in consideration of the credit which he thus received, agreed to guarantee the debtor's overdraft to an extent not exceeding £200, the guarantee being secured by a deposit of title deeds of certain property owned by Waite. During 1952, the debtor supplied goods to Waite to the value of £201 14s. 6d. and Waite paid £100 into the debtor's bank, which left a balance due of £101 14s. 6d. On 1st October, 1954, a receiving order was made against Waite and Waite's trustee in bankruptcy, in the course of realising the assets and in order to complete a sale by him of the property secured by the deposit of title deeds, paid in July, 1955, to the debtor's bank, the sum of £133 14s., the amount (with interest) of the debtor's overdraft, and obtained the release of the deeds. On 9th September, 1955, Waite's trustee commenced an action in the Brighton District Registry against the debtor to recover the sum of £133 14s. "paid for the defendant as his surety." The debtor appeared and claimed to set off the sum of £101 14s. 6d. for the goods supplied to Waite and in addition interest on the overdraft, but on 6th October, 1955, the district registrar gave leave to Waite's trustee to sign judgment for the sum of £133 14s. and £16 16s. 6d. costs, a total of £150 10s. 6d. On 15th October, 1955, Waite's trustee in bankruptcy obtained the issue of a bankruptcy notice to the debtor in which was claimed payment of the sum of £150 10s. 6d. This bankruptcy notice was not complied with and on 22nd December, 1955, Waite's trustee filed a petition in bankruptcy against the debtor based on the judgment debt. On 2nd February, 1956, the registrar (who was the same person as the registrar of the Brighton District Registry) was asked on behalf of the debtor to go behind his decision as district registrar in his judgment of 6th October, 1955, and allow the set-off claimed by the debtor. On 6th February, 1956, the registrar, in a judgment, refused to go behind his previous judgment. On 9th February, 1956, a receiving order was made against the debtor. The debtor appealed. The Divisional Court held that, although the registrar was in error in refusing to go behind his previous judgment in a bankruptcy matter, he was correct in refusing to allow the set-off since there was at the date of Waite's bankruptcy nothing presently due from the debtor to Waite. The debtor appealed.

LORD EVERSLED, M.R., said that the amount due to the debtor from Waite in 1954 (£101 14s. 6d.) was not automatically discharged by payment by Waite's trustee in bankruptcy to the debtor's bank in July, 1955, of the amount then outstanding on the overdraft (£133 14s.). It had been conceded that the relevant date for the application of s. 31 of the Bankruptcy Act, 1914, was 1st October, 1954, the date of the receiving order made against Waite, and at that date there was no debt "due" from the appellant to the bankrupt capable of forming the subject-matter of a set-off under the section. The rights of Waite against the debtor were the special but contingent rights

of a surety who had not been called upon to make any payment by the principal creditor and had not exercised the protective right of a surety to require the principal debtor to relieve him of his liability by paying the debt owed to the principal creditor. Nor was all that remained to be done the quantification of the extent of an obligation already incurred as was the case in *In re Daintrey* [1900] 1 Q.B. 546. If and when a sum certain became due from the appellant to the bankrupt or his trustee, that debt would be referable to the rights flowing from the contract of guarantee with the bank entered into by the bankrupt with the bank subsequently to and independently (albeit in consequence) of the mutual dealings between himself and the appellant. Moreover, the sum payable would depend on the state of the appellant's account with the bankers on the date when payment to the bankers was made. *Ex parte Barrett* (1865), 12 L.T. 193, was distinguishable. In *In re Fenton* [1931] 1 Ch. 85 nothing had been paid to the bankers by the bankrupt or his trustee, so the question at issue did not arise; but the reasoning of the judgments showed that if at the relevant date a guarantor had not paid the principal creditor, there was no debt "due" capable of being set-off under the section and a subsequent payment could not be related back. It was open to the court to go behind the judgment of the registrar refusing the set-off, although that judgment had not been appealed against, because for bankruptcy purposes a judgment is not conclusive evidence of a petitioning creditor's debt.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Muir Hunter* (*Nye & Donne, Brighton*); *J. K. Wood* (*Haslewood, Hare, Shirley Woolmer & Co., for Bosley and Co., Brighton*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 1226]

### CRIMINAL LAW: APPEAL TO HOUSE OF LORDS: ATTORNEY-GENERAL'S CERTIFICATE

#### *Ex parte Blackburn*

Singleton, Morris and Romer, L.JJ. 23rd July, 1956

Appeal from the Divisional Court.

The applicant, having been convicted of offences under the Prevention of Fraud (Investments) Act, 1939, and the conviction and sentence of imprisonment having been confirmed by the Court of Criminal Appeal, applied under s. 1 (6) of the Criminal Appeal Act, 1907, to the Attorney-General for the grant of a certificate to appeal to the House of Lords. This application was refused by the Attorney-General, and the applicant moved for an order of mandamus to be issued requiring the Attorney-General to consider further representations involving, according to the applicant, a principle of law of public importance, viz., the onus of proof which rested upon the prosecution in criminal cases. His application to the Divisional Court having been refused, he appealed.

SINGLETON, L.J., said that the applicant submitted that there was a duty imposed on the Attorney-General to consider representations by any of the parties mentioned in s. 1 (6), and that the Attorney-General was charged with a judicial discretion whether he should grant a certificate or not. He submitted further that the duty was not satisfied by his once considering it, but that there was a duty to reconsider it—though he agreed that there was no duty to consider a second application after the time limit imposed by s. 16 (1) of the Criminal Justice Act, 1925, had elapsed. His argument was that he had applied within the time specified and that, there having been an application in time, it was the duty of the Attorney-General to consider any renewal of the application. He went further, and said that if, at any distance of time after the Attorney-General had refused to grant his certificate, a like application was made—not another application, but a like application—it was the duty of the Attorney-General to consider it again. That appeared to involve this, that if there was an application in time, year after year it could be said that a like application could be made, and that every time it was made it was the duty of the Attorney-General to consider it. That was not the law. If it was, the whole object of s. 16 (1) of the Act of 1925 would be defeated. The purpose of the 1925 provision clearly was to bring some finality into applications. Accordingly, the application would be refused.

MORRIS and ROMER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: The applicant appeared in person.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1193]

**PRACTICE: APPEARANCE: COMPANY: PRINCIPAL  
OFFICE IN LONDON, FACTORY IN WALES****Davies v. British Geon, Ltd.**Denning and Birkett, L.JJ., and Harman, J. 25th July, 1956  
Appeal from Pearson, J. ([1956] 1 W.L.R. 769; *ante*, p. 471).

A manufacturing company had its principal and registered office in London, where the directors had their offices and held their board meetings, where the company's policy was framed, contracts for the purchase of materials were entered into and the prices of the products fixed. Its products were manufactured at its factory near Cardiff, which was controlled by an officer of the company responsible to the directors in London and who had nothing to do with sales or financial policy. Only lower paid staff were engaged by the personnel officer at the factory, higher paid staff being engaged by the secretary in London. A labourer employed by the company at the factory contracted dermatitis and issued a writ against the company in the Cardiff District Registry, stating, in compliance with R.S.C., Ord. 12, r. 4, that the company resided or carried on business within the district of the registry. Appearance was entered in London on behalf of the company, the memorandum stating that the company did not reside or carry on business within the district of the Cardiff registry. An application by the plaintiff for an order setting aside the appearance was refused by the master, whose refusal was affirmed by Pearson, J. The plaintiff appealed.

BIRKETT, L.J., delivering the first judgment, said that the questions were whether the view of Pearson, J., was right (1) that for the purposes of Ord. 12, rr. 4 and 5, a corporation was deemed to have only one place of business. (2) That the one place of business was the principal place of business where the central control and management actually abided. (3) That for the purposes of Ord. 12, rr. 4 and 5, the defendants did not carry on business at their factory in the Cardiff district. For the purposes of the present Order and rules he (his lordship) was of the opinion that the defendant company resided and carried on business in London within the meaning of the authorities, but that circumstance did not preclude it from carrying on business also in Cardiff; and he knew of no authority which compelled the court to say that it did not carry on business, for the purpose of these rules, in the district of the Cardiff District Registry. He would allow the appeal.

DENNING, L.J., agreeing, said that reason and convenience favoured that decision. The solicitors on each side were in Cardiff and counsel on both sides belonged to the local Bar. It was obviously cheaper for the interlocutory proceedings to be conducted in Cardiff rather than in London.

HARMAN, J., delivered a dissenting judgment. Appeal allowed.

APPEARANCES: *H. V. Lloyd-Jones, Q.C.*, and *H. W. J. Ap Robert Manser, Phillips & Co.*, for *Myer Cohen & Co., Barry*; *Lionel Read (Rhys Roberts & Co., for C. J. Hardwicke & Co., Cardiff)*.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [3 W.L.R. 679]

**AGRICULTURAL HOLDING: NOTICE TO QUIT:  
INTERESTS OF EFFICIENT FARMING****R. v. Agricultural Land Tribunal for Eastern Province of  
England; ex parte Grant**

Singleton, Morris and Romer, L.JJ. 27th July, 1956

Appeal from the Divisional Court.

The landlord of a farm of 63 acres gave notice under the Agricultural Holdings Act, 1948, to terminate the tenancy, and the tenants thereupon gave a counter-notice. The question whether the consent of the Minister of Agriculture and Fisheries should be given to the operation of the notice to quit was delegated to the county agricultural executive committee, who decided that the Minister's consent should be given. On appeal to the Agricultural Land Tribunal, that tribunal decided that, although the standard of management of the tenants did not reach the high standard of the landlord, they were farming reasonably well, and that the taking over by the landlord of the 63 acres might depreciate the production of the tenants' other land and would not appreciably increase the total production; accordingly, they reversed the decision of the executive committee. On an application by the landlord for an order of mandamus directing the tribunal to determine whether, in the interest of farming efficiency, consent should be given to the notice to quit, the Divisional Court granted the application. The tenants appealed.

SINGLETON, L.J., said that one of the matters raised on the different hearings was that if the landlord, whose other land was practically all around the 63 acres, was allowed to farm it, he would be able to produce better results than the tenants could; and thus it was said that it was in the interests of efficient farming that the landlord should have this piece of land of which he was the owner. Against that it was said: If the 63 acres were taken away from the tenants it would be taking away from them part of the holding which they were administering as one. The question was how far was that question, which might mean that the tenants would produce less proportionately on the rest of their holding, relevant to the immediate question under s. 25 (1) (a) of the Act of 1948? The words "in the interests of efficient farming" should be read as meaning "the efficient farming of the land in respect of which the notice is given." Nowhere was there found by the tribunal the answer to the question arising on the words in s. 25 (1), "unless he is satisfied—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise." The appeal should be dismissed.

MORRIS, L.J., agreeing, said that the question to be considered was the efficient farming of the 63 acres. The position of the unit of 63 acres in relation to other land of the landlord would be a relevant circumstance. So also it would be relevant to consider how the landlord was farming his other land. Those considerations would be relevant to the extent to which they threw light on the question whether it was desirable, in the interests of efficient farming, that these 63 acres should be farmed by the landlord rather than by the tenant. So the tribunal had first to approach that question. If it decided that, in the interests of efficient farming, so judged, it was desirable that the landlord rather than the tenant should farm the 63 acres, then the tribunal would be empowered to give consent to the operation of the notice to quit. Whether they would or would not give consent would be for them to decide, upon a fair and impartial consideration of all the relevant circumstances.

ROMER, L.J., gave a concurring judgment. Appeal dismissed.

APPEARANCES: *R. Elwes, Q.C.*, and *Geoffrey Lane (Theodore Goddard & Co., for Dyer, Marris & Frost, Boston)*; *Melford Stevenson, Q.C.*, and *John Hobson (Lee, Bolton & Lee, for Roythorne & Co., Spalding)*.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1240]

**Chancery Division****HOTCHPOT: PARTIAL INTESTACY: LIFE  
INTERESTS BROUGHT INTO ACCOUNT:  
METHOD OF VALUATION****In re Morton, deceased; Morton v. Warham**

Danckwerts, J. 26th July, 1956

Adjourned summons.

By his will, the testator directed his residuary estate to be held upon trust after the death of his wife to be divided "into three equal portions and to pay the income of one-third share to my . . . daughter Florence . . . during her life and from and after her death to pay and divide the capital of such one third share unto and equally between all her children," as to another one third share on similar trusts to his daughter Edith, and as to a further one third share "to pay the income . . . [thereof] to my said son Lewis John . . . during his life and after his death to pay the income [thereof] . . . to his children in equal shares and from and after the death of each child of my said son Lewis John to pay the capital of the share to which his, her or their parent was or were entitled unto the grandchildren of my said son Lewis John in equal shares: Provided always that if either of my said daughters shall die without leaving issue who shall attain a vested interest . . . then the share of the one so dying shall be held in trust for my other daughter and my said son Lewis John and his issue upon the like trusts as are hereinbefore declared concerning the original share of such son and daughter." His daughter Florence died in 1954, having had one child, who died in 1921 without attaining the age of twenty-one years and without having ever married. His daughter Edith died in 1954, having had one child, namely, the second defendant. The plaintiff was the only surviving son of the testator's son Lewis

John, who died in 1933. Florence's share, as to one half, went over to Edith and her child, and no difficulty arose as to that; but as regards the other half, which would go over to the share of Lewis John and his child, the plaintiff, the trusts in favour of grandchildren of Lewis John would fail as infringing the rule against perpetuities; with the result that Lewis John and the plaintiff would take successive life interests and after that the trusts of the accruing share, like the trusts of the original share, would be void under the rule against perpetuities. There was, accordingly, a partial intestacy as to that half share. The court was asked, *inter alia*, to determine whether, in calculating the amounts to be taken by the testator's children on a partial intestacy, each child ought to bring into hotchpot under s. 49 of the Administration of Estates Act, 1925, (a) the capital value of the share settled on him or her for life, or (b) the value of the interest actually taken by him or her in the events which happened, or alternatively, actually taken by such child and his or her issue.

DANCKWERTS, J., said that there was on the facts a partial intestacy, and the subject which he had to consider was hotchpot, which had been introduced into the sections of the Administration of Estates Act, 1925, which dealt with intestacy. If ss. 47 and 49 of the Administration of Estates Act applied to this case, whatever was taken by the persons taking on intestacy, being issue of the deceased, under the will of the deceased had to be brought into account. Section 49 was much more general in certain respects than s. 47. Section 47 (1) was confined to children; but it seemed plain that s. 49 (a) applied to issue of any degree, and it applied apparently to any beneficial interest acquired by any issue of the deceased under the will of the deceased. The result of that appeared to be that people who took in the present case under this partial intestacy had to bring into account, against any shares which they took in that way, the beneficial interests of any kind which they took under the provisions of the will; and it seemed plain, if s. 47 was to be read as part of s. 49, one had got to include something less than an absolute interest, as one had to include "any life or less interest." Consequently the life interest taken by those who did not take an absolute interest under the will had to be accounted for under s. 49 in a division of the testator's estate on intestacy. It seemed that the life or less interests had to be brought in at a valuation appropriate to the nature of the interest—and that seemed to require that the life interest should be valued according to the relevant actuarial considerations; and they could not be brought in as if they were equivalent to an absolute interest in the capital. To value the interest as being equivalent to a gift of capital in a case where a person took no more than a life interest seemed to him contrary to fairness and common sense. He would declare that in calculating the amounts to be taken by the testator's children on a partial intestacy each child ought to bring into hotchpot the value of the interest actually taken by such child or his or her issue. Declaration accordingly.

APPEARANCES: *Michael Browne* (Gibson & Weldon, for *L. Powell, Kendal*); *Nigel Warren* (Beardall, Fenton & Co.); *D. A. Thomas* (Denton, Hall & Burgin, for *Charles G. Lester & Russell, Bournemouth*).

(Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law) [3 W.L.R. 663]

#### COMPANY: VOLUNTARY LIQUIDATION: PENSIONS TO COMPANY'S SERVANTS: CAPITALISATION: DEDUCTION FOR TAX

##### *In re Houghton Main Colliery Co., Ltd.*

Wynn Parry, J. 30th July, 1956

Adjourned summons.

A company which went into voluntary liquidation on 30th June, 1953, had agreed to pay annual pensions to two of its employees. Owing to the liquidation it became necessary to capitalise these pensions, and the question was whether deduction should be made in respect of income tax and sur-tax in fixing the sum payable by the liquidator of the company.

WYNN PARRY, J., said that a perusal of the opinions delivered in the House of Lords in *British Transport Commission v. Gourley* [1956] A.C. 185 led inevitably to the conclusion that the opinions expressed by the majority of their lordships governed this case, and that some deduction had to be made as regards each pension on account of income tax and sur-tax. The view of Lord Goddard and Lord Reid appeared to be that personal injury cases, which arose out of tort, and wrongful dismissal cases, which arose out of contract, should be put on the same footing. The nature of the

payment was compensation, whether made as damages for personal injuries or damages for breach of contract. A number of subsidiary questions fell to be considered. First, the parties should initially endeavour, with the help of their accountants, to agree on broad lines their notional liability to tax, including the actual extent to which regard should be had to any investment income: see *Gourley's case*, per Lord Goddard and Lord Jowitt at pp. 209 and 203 respectively. The first fiscal year involved in the calculation should be the year ending 5th April, 1954, the year in which the liquidation took place, and at which the actuarial valuation of the pensions commenced. He would observe that the basis of the majority opinions in *British Transport Commission v. Gourley* was that to "ignore the tax element at the present day would be to act in a manner . . . out of touch with reality." It would be ignoring the realities if the whole of these two sums were brought into account in the fiscal year ending 5th April, 1954. The calculations must be spread over a period of years, and the proper period appeared to be the number of years which in each case the actuary took into his calculations in arriving at the respective capital sums. He proposed to stand the summons over, in order to give the parties opportunity, with the aid of their accountants, of arriving at agreed figures. If their efforts were unsuccessful the matter would have to be restored. Summons stood over with liberty to restore.

APPEARANCES: *R. B. S. Instone* (Johnson Weatherall & Sturt, for *Parker, Rhodes & Co.*); *T. D. D. Divine* (Stafford Clark & Co., for *Simpson, Curtis & Co., Leeds*); *J. G. Monroe* (Middleton, Lewis & Co., for *Alex I. Braid & Co., West Hartlepool*).

(Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law) [1 W.L.R. 1219]

#### INTERNATIONAL LAW: IMMUNITY: IMPLEADING FOREIGN SOVEREIGN: MONEY BELONGING TO ONE SOVEREIGN TRANSFERRED TO DEFENDANT AS SERVANT OF ANOTHER FOREIGN SOVEREIGN

##### *Nizam of Hyderabad and State of Hyderabad v. Jung and Others*

Upjohn, J. 30th July, 1956

Motion.

Money standing to the account of the Nizam of Hyderabad and his Government at the Westminster Bank, Ltd., was, on instructions from the Nizam, in September, 1948, when India was invading Hyderabad, transferred by Nawab Moin Nawab Jung (one of the persons entitled to operate the account) into the name of Habib Ibrahim Rahimtoola, then High Commissioner for Pakistan in the United Kingdom, who received the money in that capacity and on the instructions of the Foreign Minister of Pakistan. The Nizam and his Government brought an action against Moin, Rahimtoola and the Westminster Bank, claiming the money as money had and received to the use of the plaintiffs; there was also a claim against Moin that he had transferred the money in breach of duty. Rahimtoola, by this motion, asked that the writ in the action and the concurrent writ of summons giving leave to serve out of the jurisdiction be set aside as against him, and that the proceedings be stayed as against the Westminster Bank on the ground that the action impleaded a foreign sovereign, namely, Pakistan, or sought to interfere with the right or interest of the Government of Pakistan in that money. The motion was opposed by the Nizam and the Westminster Bank; Moin did not appear and was not represented by counsel. It was conceded that Rahimtoola had not established any equitable title to the money, and the claim to immunity was based on the fact that the legal title to the debt was vested in him as High Commissioner for Pakistan. For the Nizam it was contended, *inter alia*, that Rahimtoola held the debt as trustee for the Nizam.

UPJOHN, J., said that it was not established that this was a trust fund, or that Moin had acted in breach of his duty in transferring the money to Rahimtoola. It was clear that the sovereign was not directly impleaded; that was to say, he was not named as a party. No claim to immunity was made on behalf of Rahimtoola personally. The claim to immunity could therefore only succeed in this action if it were shown that some property of the foreign sovereign was thereby affected, and it did not seem to matter very much whether or not that was described as indirect impleading. There had been much discussion in the authorities as to what was a sufficient interest in the property to establish a claim for immunity from process. When the subject-matter of the dispute was a chattel,

possession or control were very relevant matters to consider on the claim to immunity; but in relation to a pure debt unsupported by pledge or other security such as a bearer bond, the question had to depend on title and nothing else. There could be no possession or control of a pure debt: *Haile Selassie v. Cable and Wireless, Ltd.* [1938] Ch. 847. It was not sufficient to establish a claim to immunity that the foreign sovereign should merely make a claim to such property. Lord Jowitt said in *Juan Ysmael & Co. Inc. v. Indonesian Republic Government* [1955] A.C. 72: "... a foreign government ... as a condition of obtaining immunity ... must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective." It was submitted that a sufficient title was in the Government of Pakistan because the legal title to the debt was admittedly in Rahimtoola in his official capacity of High Commissioner of Pakistan and in no other. It was well settled in the case of chattels that a proprietary interest need not be established, but possession or control was sufficient, and in such cases rightful possession or control had always been considered irrelevant: see *The Jupiter* [1924] P. 236 and *United States of America and Republic of France v. Dollfus Mieg & Cie. S.A. and Bank of England* [1952] A.C. 582. Sir Andrew Clark, on the other hand, submitted that Rahimtoola was a trustee of the debt for the true owner, the Nizam. If Rahimtoola was indeed to be regarded as truly a third party holding the debt as a trustee for the true owner, then, in his judgment, both at common law and in equity, before the Government of Pakistan could be said to be impleaded it had to establish a title to the debt. That title must necessarily be an equitable title in the circumstances of this case, for the legal right to the debt was in Rahimtoola. The crux of this case, therefore, was whether Rahimtoola was to be regarded as a third party holding the debt for the true owner. It seemed clear that the debt was vested in him as an official of his Government; and he did not think that he ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant. His lordship referred to the *Dollfus Mieg* case ([1952] A.C., at pp. 606, 607 and 612), where their lordships commented on the *Cristian* [1938] A.C. 485, and said that those were cases dealing with chattels; but the same reasoning ought to apply to the case of a debt. No case in this country had been cited on all fours with this case; but a claim to immunity in respect of a debt had been upheld in the District Court of New York in *Bradford v. Chase National Bank of City of New York* (1938), 24 Fed. Supp. 28, a case reversed on its facts on appeal. However, the recent authorities undoubtedly contained warnings against extending the doctrine of sovereign immunity from process. There was, then, no absolute and universal rule that a foreign independent sovereign could not be impleaded in the courts in any circumstances (*Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] A.C. 319). In his judgment, however, the general principle had to be applied. The debt being in Rahimtoola as the servant of his Government, the matter had to be treated as though the debt was due to the Government, though that did not, of course, entitle the Government to claim immunity on the ground that it was being directly impleaded. The plaintiffs could not go behind the legal title and show that the equitable title was in them, and the fact that the legal title was in the servant of the sovereign was sufficient to support its claim to immunity. The writs should accordingly be set aside as against Rahimtoola, and proceedings stayed as against the bank. Judgment on the motion for the third defendant. Leave to appeal extended to 1st October.

APPEARANCES: B. J. M. MacKenna and Oliver Smith (Sanderson, Lee, Morgan, Price & Co.); Sir Andrew Clark, Q.C., and S. B. R. Cooke (Stanley Johnson & Allen); Geoffrey Cross, Q.C., Eustace W. Roskill, Q.C., and P. Foster (Freshfields).

[Reported by Mrs IRENE G. R. MOSES, Barrister-at-Law] [3 W.L.R. 667]

## Queen's Bench Division

### EDUCATION: COLLECTION OF SCHOOL MEALS MONEY: POWERS OF EDUCATION AUTHORITY

#### Price and Others v. Sunderland Corporation

Barry, J. 13th July, 1956

Action.

The Sunderland Corporation, a local education authority, instituted a scheme for the provision of school meals for children,

and for a number of years school teachers employed by the corporation had co-operated in the scheme by the collection and recording of the money paid by the schoolchildren for the meals. On 23rd March, 1956, the local secretary of the Sunderland and District Branch of the Association of Schoolmasters informed the director of education that members of his association had decided, in accordance with the wishes of the National Association of Schoolmasters, not to receive school meals money from the beginning of the next term, 9th April, 1956. On 4th April, the director of education sent a circular letter to all the members of the association referring to that letter and stating that the collection of money for school dinners was a clearly recognised and accepted term of employment of all teachers, and urging them to carry out the recognised arrangements. On 11th April, 1956, the corporation passed a resolution "... that those teachers ... who are members of the Sunderland and District Association of Schoolmasters and who refuse to collect money for school meals in school hours be given notice to terminate their engagements on 31st August, 1956." On 13th April, 1956, the director of education wrote to all the members of the association informing them of the resolution and requesting them to answer the following questions by 18th April: "(i) Do you normally collect dinner money in school during normal school hours? (ii) Are you prepared to carry out this collection of dinner money?" The plaintiffs, six members of the association employed by the corporation, sought a declaration to the effect (1) that the resolution of 11th April, 1956, was *ultra vires* the corporation, and (2) that the corporation was not entitled to impose upon teachers in their employment duties in respect of school meals other than the supervision of pupils, namely, the duties of clerks and cashiers. Section 49 of the Education Act, 1944, provides that regulations shall be made by the Minister imposing upon local education authorities "the duty of providing milk, meals, and other refreshment ... and such regulations shall make provision as to ... the services to be rendered by managers, governors, and teachers with respect to the provision of such milk, meals, or refreshment ... so, however, that such regulations shall not impose upon teachers ... duties upon days on which the school ... is not open for instruction, or duties in respect of meals other than the supervision of pupils ..." and such regulations, the Provision of Milk and Meals Regulations, 1945, were made by the Minister.

BARRY, J., said that the words "duties in respect of meals" in s. 49 of the Education Act, 1944, could not be cut down to exclude the collection of money in respect of meals. Under s. 49 the local authority might require their teachers to supervise the pupils during meals, and, although that did not mean that, with the teachers' consent, they could not carry out the scheme as at present carried out, it did mean that the services rendered by teachers in the carrying out of such schemes were voluntary and that the corporation could not require the teachers, as a condition of their employment, to undertake them. Under the clear provisions of the section any services rendered by teachers in connection with the school meals service, other than that of supervision, were voluntary. As to whether the corporation had the power to pass the resolution of 11th April, 1956, his lordship said that had the position been that the corporation were saying that members of an association who took the sort of action taken by the plaintiffs' association, not because they had any dispute with the corporation, but because they objected to some Act of Parliament for the terms of which the corporation were in no way responsible, were the type of men whom they did not want to employ, they would have been entitled to give them the requisite notice to terminate their employment; and had the resolution declared that all members of the association on whose behalf the letter of 23rd March, 1956, had been sent must go, that would have been a decision which it was within the corporation's power to take. But that was not what the resolution said. Its dual requirements, membership of the association and refusal to collect money, did not refer to some past refusal. It was impossible to attribute any other meaning to the resolution, either read alone or in conjunction with the preceding and following letters, than that it required the teachers to collect the school meals money under pain of dismissal. It was not within the powers of the corporation to resolve to take an action which an Act of Parliament under which their powers were derived clearly prohibited, and the resolution to dismiss the teachers, merely because they decided to withhold a voluntary service, when the Act of Parliament prohibited the corporation from requiring

that service, was a resolution which was *ultra vires*. Judgment for the plaintiffs.

APPEARANCES: *Gerald Gardiner, Q.C.*, and *Neil McKinnon (Craigie, Wilders & Sorrell)*; *Charles Russell, Q.C.*, and *R. J. Parker (Sharpe, Pritchard & Co., for G. S. McIntire, Sunderland)*.

[Reported by Miss J. F. LAMB, Barrister-at-Law]

[1 W.L.R. 1253]

## Court of Criminal Appeal

### CRIMINAL LAW: SENTENCE: SUBSTITUTION OF INCREASED SENTENCE

**R. v. Lovelock**

Lord Goddard, C.J., Ormerod and Ashworth, JJ.

24th July, 1956

Appeal against conviction.

The appellant was indicted on two counts charging him with attempted rape and indecent assault on a girl under the age of thirteen. He was convicted on both counts and sentenced to six years imprisonment on the first count and two years on the second. He appealed against his conviction for attempted rape. The court having allowed the appeal, the Crown applied for the substitution of a sentence of preventive detention for that of two years imprisonment under the provisions of s. 5 (1) of the Criminal Appeal Act, 1907.

LORD GODDARD, C.J., said that it was a subsection which so far as his experience went had never been put into force before. The court had found that the appellant was not properly convicted on the first count which carried the sentence of six years, but he was properly convicted on the second count, which carried a maximum sentence of only two years. However, as the necessary notices were served and convictions proved, it would have been possible for the appellant to have been sentenced to preventive detention. A sentence of two years for a horrible offence of this sort was quite inadequate. It was the fourth time he had been convicted of assaults on little girls and the court considered that it was right that they should put into force the provisions of s. 5 (1) of the Act of 1907, and they would pass the sentence which could have been lawfully passed on the count of indecent assault, viz., one of preventive detention. The period of preventive detention might have been a very long one, but considering that it was the first time that this section had been invoked the court would only pass a sentence of preventive detention of the same length as the judge did of imprisonment on the first count. The sentence upon the appellant was that he should go to preventive detention for six years. Appeal allowed. Sentence varied.

APPEARANCES: *B. D. Bush (Kingsford, Dorman & Co.)*; *J. Ross (Registrar, Court of Criminal Appeal)*.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1217]

## IN WESTMINSTER AND WHITEHALL

### STATUTORY INSTRUMENTS

**Boot and Floor Polish Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1956.** (S.I. 1956 No. 1279.) 5d.

**Bristol Waterworks Order, 1956.** (S.I. 1956 No. 1262.) 5d.

**Carradale Harbour Order, 1956.** (S.I. 1956 No. 1267 (S.60).) 6d.

**Control of Hiring (No. 2) Order, 1956.** (S.I. 1956 No. 1269.) 5d. As to this order, see p. 624, *ante*.

**Fire Services (Conditions of Service) (No. 2) Regulations, 1956.** (S.I. 1956 No. 1304.) 5d.

**Flax and Hemp Wages Council (Great Britain) Wages Regulation Order, 1956.** (S.I. 1956 No. 1280.) 8d.

**Flaxton Rural District (New Streets) Order, 1956.** (S.I. 1956 No. 1282.)

**Guildford, Godalming and District Water Board Order, 1956.** (S.I. 1956 No. 1281.) 5d.

**Hire-Purchase and Credit Sale Agreements (Control) (Amendment) Order, 1956.** (S.I. 1956 No. 1270.) 5d. As to this order, see p. 624, *ante*.

**Import Duties (Drawback) (No. 9) Order, 1956.** (S.I. 1956 No. 1257.) 5d.

**Import Duties (Drawback) (No. 10) Order, 1956.** (S.I. 1956 No. 1258.)

**Investment Allowances (Fuel Economy Plant) Order, 1956.** (S.I. 1956 No. 1295.) 5d.

This order, made under s. 15 of the Finance Act, 1956, prescribes certain fuel saving plant in respect of which investment allowances are to be continued for expenditure incurred after 17th February, 1956.

**Iron and Steel Board Scheme for Provision of Funds Confirmation Order, 1956.** (S.I. 1956 No. 1260.) 5d.

**Marriage Notice (Scotland) Order, 1956.** (S.I. 1956 No. 1268 (S.61).) 5d.

**Mineral Oil in Food (Amendment) (Scotland) Regulations, 1956.** (S.I. 1956 No. 1294 (S.62).) 5d.

**Motor Vehicles (Authorisation of Special Types) Order, 1956.** (S.I. 1956 No. 1265.) 5d.

**National Health Service (Designation of Teaching Hospitals, London) Order, 1956.** (S.I. 1956 No. 1297.) 5d.

**National Health Service (General Dental Services) (Scotland) Amendment Regulations, 1956.** (S.I. 1956 No. 1266 (S.59).) 5d.

**Plymouth Water Order, 1956.** (S.I. 1956 No. 1305.) 5d.

**Register of County Court Judgments (Amendment) Regulations, 1956.** (S.I. 1956 No. 1293 (L.14).)

These regulations, which come into operation on 1st September, 1956, amend the Register of County Court Judgments Regulations, 1936, so as to make it unnecessary to keep the register open to inspection on Saturdays.

**Safeguarding of Industries (Exemption) (No. 6) Order, 1956.** (S.I. 1956 No. 1256.) 7d.

**Stopping up of Highways (Berkshire) (No. 5) Order, 1956.** (S.I. 1956 No. 1251.) 5d.

**Stopping up of Highways (Birmingham) (No. 4) Order, 1956.** (S.I. 1956 No. 1283.) 5d.

**Stopping up of Highways (Bradford) (No. 5) Order, 1956.** (S.I. 1956 No. 1284.) 5d.

**Stopping up of Highways (Bristol) (No. 8) Order, 1956.** (S.I. 1956 No. 1285.) 5d.

**Stopping up of Highways (Chester) (No. 1) Order, 1956.** (S.I. 1956 No. 1272.) 5d.

**Stopping up of Highways (Lancashire) (No. 15) Order, 1956.** (S.I. 1956 No. 1289.) 5d.

**Stopping up of Highways (Lincolnshire—Parts of Lindsey) (No. 3) Order, 1956.** (S.I. 1956 No. 1286.) 5d.

**Stopping up of Highways (Lincoln, Parts of Lindsey) (No. 4) Order, 1956.** (S.I. 1956 No. 1273.) 5d.

**Stopping up of Highways (London) (No. 28) Order, 1956.** (S.I. 1956 No. 1276.) 5d.

**Stopping up of Highways (London) (No. 29) Order, 1956.** (S.I. 1956 No. 1290.) 5d.

**Stopping up of Highways (Monmouthshire) (No. 1) Order, 1956.** (S.I. 1956 No. 1291.) 5d.

**Stopping up of Highways (Nottinghamshire) (No. 6) Order, 1956.** (S.I. 1956 No. 1287.) 5d.

**Stopping up of Highways (Nottinghamshire) (No. 7) Order, 1956.** (S.I. 1956 No. 1252.) 5d.

**Stopping up of Highways (Stockport) (No. 2) Order, 1956.** (S.I. 1956 No. 1274.) 5d.

**Stopping up of Highways (Warwickshire) (No. 7) Order, 1956.** (S.I. 1956 No. 1275.) 5d.

**Stopping up of Highways (West Riding of Yorkshire) (No. 19) Order, 1956.** (S.I. 1956 No. 1288.) 5d.

**Stopping up of Highways (Wiltshire) (No. 6) Order, 1956.** (S.I. 1956 No. 1292.) 5d.

**Draft Teachers' Salaries (Scotland) Regulations, 1956.** 2s. 2d.

**West of Maidenhead-Oxford Trunk Road (Burchetts Green Cross Roads Diversion) Order, 1956.** (S.I. 1956 No. 1271.) 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

## NOTES AND NEWS

## Honours and Appointments

Mr. CHARLES FRANCIS BAGOT GILMAN, solicitor, of Oxford, has been appointed Registrar of the Oxford District Registry of the High Court and of the Oxford County Court in succession to Mr. J. M. Eldridge, who has retired from that post.

Sir JAMES HENRY, M.C., Q.C., Solicitor-General, Tanganyika, has been appointed Attorney-General, Cyprus, in succession to Mr. C. G. Tornaritis, Q.C., who has been seconded to the post of Commissioner for the Consolidation of Cyprus Legislation in London.

Mr. CHARLES WHITEHEAD, solicitor, of Maidstone, has been appointed clerk to the justices at Malling, Kent.

## Miscellaneous

## DEVELOPMENT PLAN

## WEST BROMWICH DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of West Bromwich. The plan, as approved, will be deposited in the Town Hall, West Bromwich, for inspection by the public.

## INSURANCE STATISTICS

The publication "Statements of Life Assurance and Bond Investment Business deposited with the Board of Trade during the year ended December 31st, 1955" is now on sale and can be obtained from Her Majesty's Stationery Office, price ten guineas per set of two volumes (which are not sold separately), totalling 1,308 pages.

NATIONAL PARKS AND ACCESS TO THE  
COUNTRYSIDE ACT, 1949

The following notices of the preparation of maps and statements under the above Act, or of modifications to maps and statements already prepared, have appeared since the tables given at pp. 115, 325 and 572, *ante* :—

## DRAFT MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for receipt of representations or objections
Brecon County Council	Areas 1 and 2		8th December, 1956
Caernarvonshire County Council	County of Caernarvon: modifications to draft map and statement of 29th June, 1954	17th August, 1956	29th September, 1956
Cheshire County Council	Chester Rural District in the Administrative County of Chester	24th July, 1956	30th November, 1956
Cornwall County Council	Penzance Municipal Borough: modifications to draft map and statement of 19th September, 1953	7th July, 1956	30th August, 1956
Dorset County Council	Beaminster Rural District: Further modifications to draft map and statement of 8th May, 1953	20th July, 1956	30th August, 1956
Northumberland County Council	Morpeth, Belford, Bellingham, Rural Districts: modifications to draft maps and statements of 17th May and 8th December, 1954	15th August, 1956	20th September, 1956
Nottinghamshire County Council	Arnold, Beeston and Stapleford, Carlton, Eastwood, Hucknall Urban Districts; part of Basford Rural District	12th July, 1956	30th November, 1956

## PROVISIONAL MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for applications to Quarter Sessions
Cornwall County Council	Launceston, Liskeard Municipal Boroughs	24th July, 1956	31st August, 1956
Worcestershire County Council	Evesham, Martley Rural Districts	10th August, 1956	6th September, 1956

## DEFINITIVE MAPS AND STATEMENTS

Surveying Authority	Districts covered	Date of notice	Last date for applications to the High Court
East Suffolk County Council	Lowestoft, Southwold Boroughs; Lotherland Rural District	27th July, 1956	6th September, 1956
Exeter City Council	Exeter City	17th July, 1956	27th August, 1956
Lewes County Council	Newhaven Urban District	3rd August, 1956	13th September, 1956
Rutland County Council	Rutland County	1st August, 1956	11th September, 1956

## Wills and Bequests

Sir Roger Braddyll Hulton, solicitor, of Cheltenham, Gloucestershire, left £36,699 (£23,376 net).

Mr. James Olivey, solicitor, of 218 Strand, W.C.2, left £30,837 net.

Mr. Frank Arthur Platt, solicitor, of Walsall, left £11,633 (£10,443 net).

## OBITUARY

## COLONEL G. R. CROUCH, M.C., T.D.

Colonel Guy Robert Crouch, M.C., T.D., retired Clerk of the Peace for Buckinghamshire, and Clerk to the Buckinghamshire County Council, died on 17th August at Aylesbury, aged 66. He was admitted in 1912.

## MR. F. H. DUNCAN

Mr. Frank Hamer Duncan, solicitor, of Southport, Lancashire, died recently, aged 60. He was, two years ago, president of the Southport and Ormskirk Law Society and was for many years a Commissioner of Taxes. He was admitted in 1933.

## MR. A. D. M. EDWARDS

Mr. Arthur Delmiro Mariano Edwards, solicitor, of Brighton and Worthing, died recently. He was admitted in 1923.

## MR. A. NEWTON

Mr. Alfred Newton, solicitor, of Stockport, Cheshire, and Wilmslow, died on 14th August, aged 67. He was a member of the Stockport Incorporated Law Society and chairman of the Stockport District Legal Aid Society. He was admitted in 1923.

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